

1 STATE OF CALIFORNIA

2 DEPARTMENT OF INDUSTRIAL RELATIONS

3
4 DECISION ON ADMINISTRATIVE APPEAL

5 IN RE: PUBLIC WORKS CASE NO. 2000-032

6 MAINTENANCE AND REPAIR WORK AT
7 COMMERCE REFUSE-TO-ENERGY FACILITY,
8 COUNTY SANITATION DISTRICT NO. 2, LOS ANGELES COUNTY

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10 I. Introduction and Procedural History

11 On February 11, 2000, Cheryl M. Zuvich, Purchasing Manager
12 for the County Sanitation Districts of Los Angeles County, wrote
13 to the Department of Industrial Relations ("Department"),
14 requesting a written opinion as to whether certain maintenance
15 and repair work undertaken at the Commerce Refuse-to-Energy
16 Authority ("CREA") facility is a public work under the California
17 Prevailing Wage Law ("PWL"). Department Director Stephen J.
18 Smith issued a coverage determination on June 6, 2000, finding
19 that the maintenance and repair work was covered under the PWL.
20 On July 11, 2000, CREA filed an "Objection and Appeal"
21 ("Appeal"). The Appeal's principal contention is that the work
22 performed by workers of Total Western, Inc. ("TWI"), a licensed
23 mechanical and electrical contractor, under agreement with CREA
24 is exempt from prevailing wage obligations under California Labor
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1 Code¹ section 1771 because the workers are "force account" of
2 CREA.

3 In its Appeal, CREA also states that the Director's coverage
4 determination was issued without CREA's having the opportunity to
5 review evidence and present rebuttal evidence. In response to
6 CREA's request for a copy of the record upon which the
7 determination was based, this Department served CREA with a copy
8 of the administrative record.²

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10 II. Issues and Conclusions on Appeal

11 The central issue presented by this Appeal is whether the
12 employees supplied by TWI to the CREA facility are force account
13 employees of CREA. I conclude, based on the applicable law and
14 the Attorney General's opinion discussed below, that the
15 employees supplied by TWI to CREA are not force account of CREA.
16 Therefore, the exemption from the PWL is unavailable. I also
17 find that the elements of a public work are present in this case.

18 III. Relevant Facts

19 CREA is a joint undertaking of County Sanitation District
20 No. 2 of Los Angeles County ("District") and the City of Commerce
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25 ¹ Unless otherwise indicated, all statutory references are
to the Labor Code.

26 ² Attached to Ms. Zuvich's request were copies of a 2000
27 Request For Proposals ("RFP") and other related documents.
CREA's attorneys also attached as Exhibit A to the Appeal the
28 1999 version of the RFP. The 1999 and 2000 RFPs are very
similar, but all references will be to the 2000 version, unless
otherwise specified.

1 ("City"), both public agencies. CREA owns a facility that
2 produces electricity for sale to Southern California Edison
3 Company. The District operates the facility on behalf of itself
4 and the City. The facility is designed to burn solid wastes to
5 produce steam for turbines that produce electricity. On a semi-
6 annual basis, the District performs scheduled maintenance and
7 repair work on the facility to maintain its efficiency. The
8 plant is shut down during the period of the maintenance and
9 repair work. In order to shorten any outage period, the District
10 attempts to perform all the maintenance and repairs concurrently,
11 and to maximize the number of workers utilized. As the number of
12 workers needed exceeds the available work force, the District
13 solicits bids from companies for boilermaker/mechanics, welders
14 and laborers based on hourly rates.

16 The RFP seeking these temporary workers states that the
17 workers will work under the District's supervision (RFP sections
18 6.1 and 8.4) and with the District's tools for repair of the
19 furnace, grates, ducting and other equipment. The hourly rates
20 must include travel, meals, benefits, insurance (including
21 workers' compensation insurance), taxes, safety glasses and hard
22 hats, as well as straight time, over time and double time rates.
23 (RFP section 3.1.) The Notice Inviting Bids states that the
24 successful bidder will be required to file contractor's liability
25 and workmen's compensation insurance.

27 According to the RFP, the bidding contractors are required
28 to provide to the District qualified workers as well as proof of

1 worker qualification if, for any reason, the District questions
2 the abilities of any worker. The RFP specifies minimum
3 qualifications for each classification. The structural welders
4 must have five years of experience. The boilermaker/ mechanics
5 must have a minimum of eight years experience, with at least five
6 years experience as a journeyman. The boilermaker/ mechanic
7 apprentices must have four years experience. The laborers must
8 have a minimum of three years industrial labor work experience.
9 At least some of the welders must qualify as ASME welders with
10 sufficient knowledge of welding procedures to pass an examination
11 administered by Accurate Weld Testing before they may be employed
12 on the project (RFP section 3.5.1). The ASME welders must have a
13 minimum of five years experience (RFP section 3.5.2).

14 All workers must pass a physical examination (RFP section
15 8.1), respirator fit test and special safety tests administered
16 by the District. (RFP section 8.2.) A worker must be clean-
17 shaven in the contact areas to take the respirator test. Those
18 workers who fail the District-provided tests will be sent home
19 without pay and will not be paid for the time needed to take the
20 tests. (RFP section 8.2). The District will not pay for lost
21 hours caused by an incompetent worker. Hours lost due to the
22 bidder's employees' incompetence will not be billed to or paid
23 for by CREA. (RFP section 3.8). The District will provide
24 uniforms for workers in lead areas. (RFP section 6.4). These
25 workers are required to bring a complete change of clothing,
26 including undergarments and shoes, for each shift. (RFP section
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1 8.3). The District also provides all necessary tools. (RFP
2 section 6.1).

3 Each worker must sign in and out on District-provided sign-
4 in sheets. (RFP section 8.5.) Only workers listed on the sheets
5 and verified by the District may be included in TWI's billing to
6 the District. (RFP section 8.5.) The workers must sign for all
7 tools, uniforms, keys, locks and safety equipment. TWI will be
8 billed at cost for any items not returned by the workers. (RFP
9 section 8.6). TWI must provide training records to CREA showing
10 that every worker has received basic training in fall protection,
11 back safety, hearing protection, fire and emergency plan,
12 lockout/tag out safety, injury and illness prevention plan,
13 hazardous communications, confined space, welding safety,
14 personal protection equipment and forklift training. (RFP
15 section 9.1.)
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17 The work takes place in May and November most years. It
18 requires approximately 4,040 hours of work between May 3, 1999
19 and May 21, 1999, and approximately 5,480 hours of work between
20 November 1, 1999 and November 19, 1999. At the time of the
21 bidding, CREA estimated that the work performed between May 1,
22 2000 and May 21, 2000, would require 38 workers working a total
23 of 6,370 hours, and the work to be performed between November 1,
24 2000, and November 16, 2000, would require 43 workers working
25 3,960 hours.
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27 Section 3.6 of the RFP states, "Prevailing wages are not
28 considered applicable to this bid because the workers will be

1 temporary employees of the Authority under our supervision and
2 working with our tools. In 1996, the Districts received from the
3 California Labor Standards Enforcement (sic) a Notice of Penalty
4 Assessment re: prevailing wages on a previous outage utilizing
5 temporary employees. The Districts do not agree with that
6 determination and this bid has different special provisions. The
7 Districts has (sic) filed with the Director of Industrial
8 Relations a request to determine coverage. The District will not
9 pay any amount over the hourly rates quoted."

11 IV. Analysis

- 12 1. The Work Is Covered By Prevailing Wage Requirements
13 Because TWI Employees Are Not The Force Account of CREA
Under The PWL.

14 CREA contends that the workers provided by TWI are force
15 account of CREA and therefore not entitled to prevailing wages.
16 Thus, we must determine whether the workers supplied to CREA by
17 TWI qualify as CREA's force account, as this term is defined
18 under the PWL.

19 Section 1771 states: "Except for public works projects of
20 one thousand dollars (\$1,000) or less, not less than the general
21 prevailing rate of per diem wages for work of a similar character
22 in the locality in which the public work is performed, and not
23 less than the general prevailing rate of per diem wages for
24 holiday and overtime work fixed as provided in this chapter,
25 shall be paid to all workers employed on public works. This
26 section is applicable only to work performed under contract, and
27 is not applicable to work carried out by a public agency with its
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1 own forces... . This section is applicable to contracts let for
2 maintenance work." (Emphasis added.)

3 In *Bishop v. San Jose* (1969) 1 Cal.3d 56, 81 Cal.Rptr. 465,
4 the California Supreme Court confirmed that the PWL does not
5 apply to force account of a public entity.

6 In *Construction Industry Force Account Council v. Amador*
7 *Water Agency* (1991) 71 Cal.App.4th 810, 84 Cal.Rptr.2d 139
8 (footnote 3), the Third District Court of Appeal defined "force
9 account" for purposes of the PWL:

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11 ...[I]n connection with the regulations of the State
12 Controller concerning county budget reports, and an
13 opinion of the Attorney General regarding the
14 application of the prevailing-wage laws, the definition
15 of a force account is limited to work performed by
16 public entities' own personnel. (Cal.Code Regs., Tit.
17 2, §1988; 70 Ops.Cal.Atty.Gen. (1987) 92, 97.)

18 Here, the Court of Appeal recognized that the term force
19 account has been given a specific meaning in the context of the
20 PWL. That meaning has been narrowly construed to include only
21 public employees.

22 In response to a request by a California Assembly member
23 whether workers employed by an engineering firm to act as City
24 Engineers were entitled to be paid prevailing wages, the
25 California Attorney General opined:

26 The prevailing wage prescription of 1771 is contained
27 in the first sentence, which applies unequivocally to
28 'all workers employed on public works.' The second
sentence is an exception relating to 'work carried out
by a public agency with its own forces.' This
exception is specifically limited to work done by force
account...i.e., by its own employees as distinguished
from work performed pursuant to contract with a
commercial firm for similar services.

1 Manifestly, employees of the firm are not those of the
2 City. In this regard, it should be recalled that
3 statutory exceptions should be narrowly construed.
4 Further, expressly excluded from this exception is
5 'work performed under contract.' Hence, the rule
6 applies that where statutory language is clear and
7 unambiguous, there is no need for further construction
8 and the courts should not indulge in it.

9 Nor would the exemption of the firm's employees be
10 consistent with the nature and purpose of the
11 prevailing rate standards. (Id. at pp. 96-97.)
12 (Citations omitted.)

13 In this case, TWI supplies the workers by virtue of its
14 contract with CREA. The Attorney General's finding as to the
15 work of the engineering firm hired to act as City Engineers is
16 equally applicable in this case. The work for CREA was done
17 under contract between CREA and TWI, and the workers are not
18 force account of the City.

19 Furthermore, public employees, or force account, enjoy due
20 process rights and enjoy a "property interest" in their
21 employment that assures basic protections to public employees.
22 *Coleman v. State Personnel Board* (1991) 52 Cal.3d 1102, 1109, 278
23 Cal.Rptr. 346, 348. The work of the workers provided by TWI is
24 seasonal. The agreement between CREA and TWI makes very clear
25 that the workers are not guaranteed any minimum number of hours.
26 They work at the pleasure of CREA and its supervisors. CREA
27 reserves the right to send workers home without pay if they do
28 not perform in accordance with its expectations and the right not
to accept for one year any worker who leaves prior to the
completion of maintenance and repair work if, in CREA's opinion,
that worker's departure lengthens the outage. There are thus no

1 standards contained in the agreement that can be construed to
2 offer to the workers provide by TWI even the most basic benefits
3 and protections enjoyed by most public employees, or force
4 account, in California.

5 CREA also argues that the workers are CREA's force account
6 under the theory that CREA and TWI are dual employers, and that
7 CREA's dual employment of the workers renders them force account.
8 CREA relies on *Riley v. Southwest Marine, Inc.* (1988) 203
9 Cal.App.3d 1242, 250 Cal.Rptr. 718, a workers' compensation case
10 holding that two entities exercising certain powers of control
11 over an employee may both be deemed employers of the employee for
12 purpose of workers' compensation liability.
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14 Even if there were a factual basis to establish that CREA
15 and TWI are dual employers under workers' compensation law,
16 CREA's dual employer status under the workers' compensation law
17 does not render the workers its force account under the PWL. On
18 its face, the PWL covers the TWI workers. The maintenance and
19 repair work are performed under a contract between CREA and TWI,
20 and paid for with public funds. There is nothing in the PWL to
21 indicate that its purpose should be secondary to the workers'
22 compensation law when determining which persons should benefit
23 from the PWL. To import concepts designed for one remedial
24 statutory scheme to defeat the clear mandate of another remedial
25 legislative enactment would violate principles of statutory
26 construction.
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1 The California Supreme Court discussed the purposes of the
2 PWL:

3 The overall purpose of the prevailing wage law, as
4 noted earlier, is to benefit and protect employees on
5 public works projects. This general objective subsumes
6 within it a number of specific goals: to protect
7 employees from substandard wages that might be paid if
8 contractors could recruit labor from distant cheap-
9 labor areas; to permit union contractors to compete
10 with nonunion contractors; to benefit the public
11 through the superior efficiency of well-paid employees;
12 and to compensate non-public employees with higher
13 wages for the absence of job security and employment
14 benefits enjoyed by public employees.

15 *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th
16 976, 987, 4 Cal.Rptr.2d 837, 843.

17 The protection of workers is the primary intent of the PWL.
18 Finding the workers provided by TWI to be the force account of
19 CREA would deprive these employees of prevailing wages without
20 giving them the benefits of public employment, and therefore
21 undermine the purpose of the PWL.

22 v. Conclusion

23 For the forgoing reasons, I conclude that the elements of
24 PWL coverage as set forth in sections 1720(a) and 1771 are met.
25 The workers employed by TWI at the CREA facility, therefore, are
26 entitled to be paid prevailing wages.

27 DATED: 10/9/01

28 Stephen J. Smith
Stephen J. Smith, Director